

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-480

ALICIA M. RASP

vs.

VIRGINIA COSTA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Alicia M. Rasp, appeals from an order denying her motion to remove a default judgment<sup>1</sup> entered under Mass. R. Civ. P. 33 (a) (6), as appearing in 454 Mass. 1404 (2009), for failing to file a timely response to the interrogatories of the defendant, Virginia Costa. We affirm.

Background. On April 5, 2017, the plaintiff filed her complaint against the defendant alleging negligence, causing the plaintiff personal injury. The defendant filed her answer on May 5, 2017. On June 20, 2017, the defendant served her first

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<sup>1</sup> The motion is titled as one to remove a default judgment. The judgment was not by default, but instead was entered pursuant to Mass. R. Civ. P. 33 (a) (6), as appearing in 454 Mass. 1404 (2009). We refer to the motion using the same terminology with which the plaintiff labeled it -- as a motion to remove a default judgment.

set of interrogatories.<sup>2</sup> As of September 13, 2017, the plaintiff had not answered, and the defendant then served on the plaintiff a final request for answers to interrogatories pursuant to Mass. R. Civ. P. 33 (a) (3), as appearing in 436 Mass. 1401 (2002).

On September 20, 2017, Lisa Walsh, a legal assistant to the plaintiff's lawyer, contacted the defendant's lawyer and indicated that the interrogatories may not have been received or may have been misplaced.<sup>3</sup> Pursuant to Walsh's request, defense counsel then mailed a hard copy of the interrogatories to Walsh with a handwritten note. In a letter dated November 8, 2017, defense counsel inquired of plaintiff's counsel when he (defense counsel) could expect the answers to the interrogatories. Plaintiff's counsel responded in a voicemail message, stating that he would have answers to counsel in or about "two weeks." The plaintiff never submitted answers to the defendant's interrogatories. On December 22, 2017, defense counsel mailed an application for final judgment under Mass. R. Civ. P. 33 (a) (4), as appearing in 436 Mass. 1401 (2002), to the plaintiff's lawyer, together with a supporting affidavit.<sup>4</sup> On

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<sup>2</sup> In his affidavit in support of the plaintiff's motion to remove the default judgment, plaintiff's counsel denied having received the interrogatories at that time.

<sup>3</sup> The voicemail message from Walsh containing this information was transcribed and was part of the defendant's submission in opposition to the plaintiff's motion.

<sup>4</sup> In his affidavit, plaintiff's counsel denied receiving the application for final judgment. Plaintiff's counsel also

the basis of the application, judgment entered pursuant to rule 33 (a) (6) on January 19, 2018.

The plaintiff did not file a timely appeal from the final judgment. However, she filed a motion to remove the "default" on February 20, 2018; the motion was denied on February 28, 2018, without a hearing. On March 16, 2018, the plaintiff filed a notice of appeal from the order denying the motion.<sup>5</sup>

Discussion. We review the denial of the motion for an abuse of discretion. See Piepul v. Bryson, 41 Mass. App. Ct. 932, 932 (1996). We must determine whether the judge "made a clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). The judge denied the plaintiff's motion seeking removal of the default judgment

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averred that, in September of 2017, he had a telephone conference with defense counsel in which defense counsel said he could disregard the final request for interrogatories. Defense counsel denied any such telephone call.

<sup>5</sup> The plaintiff's notice of appeal states that she also is appealing from the final judgment, but, as the notice of appeal was filed on March 16, 2018, and the judgment entered on January 19, 2018, the notice was untimely as to the final judgment, and we do not consider it.

for failure to establish any of the criteria set forth in Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974).<sup>6,7</sup>

It is significant that the plaintiff never -- at any point -- submitted answers to the defendant's interrogatories.

Institution for Sav. in Newburyport & Its Vicinity v. Langis, 92 Mass. App. Ct. 815, 819 (2018) (interpreting rule 33 [a] as "explicit that such a disregard of [its] procedures 'shall' result in a default" [citation omitted]). The plaintiff provides no reason why the interrogatories were never answered. She also does not give any basis for her claim that the judge erred in not granting her a hearing on her motion for removal of default judgment, or in "adopting wholesale [the defendant's] version of events."

The defendant, in her opposition to the plaintiff's motion, submitted ample evidence controverting the plaintiff's argument for mistake. See Mass. R. Civ. P. 60 (b) (1), 365 Mass. 828 (1974). Defense counsel submitted (1) an affidavit swearing that he sent the interrogatories and the final notice to the

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<sup>6</sup> The judge wrote that "substantially for the reasons set forth in defendant's opposition, plaintiff has failed to establish circumstances under MRCP 60 (b) warranting removal of the default judgment entered against her."

<sup>7</sup> See J.W. Smith & H.B. Zobel, *Rules Practice* § 33.6.1, at 155-156 (Supp. 2018), for clarification on when a motion for relief from a judgment entered on the basis of a failure to answer interrogatories is considered under Mass. R. Civ. P. 55 (c), 365 Mass. 822 (1974), as opposed to under rule 60 (b), as is the case here.

attorney's address on record; (2) transcribed voicemails of the plaintiff's attorney and his legal assistant discussing the interrogatories; and (3) copies of the interrogatories with a dated certificate of service. Because the judge denied the motion on the basis of the defendant's opposition, it is clear that this evidence was credited by the judge.

The plaintiff's failure to answer the interrogatories is also not "excusable neglect." Neuwirth v. Neuwirth, 85 Mass. App. Ct. 248, 257 (2014) (stating excusable neglect "does not embrace '[a] flat mistake of counsel about the meaning of a statute or rule' or other garden-variety oversight[s]" [citation omitted]). The excusable neglect standard has been characterized as "stringent" and calls for "unique or extraordinary circumstances." Langis, 92 Mass. App. Ct. at 816, 819. The judge did not abuse his discretion in concluding that no mistake or excusable neglect occurred. L.L., 470 Mass. at 185 n.27.

The plaintiff also argues that the judgment should be vacated due to fraud, misrepresentation, or misconduct of opposing counsel. Mass. R. Civ. P. 60 (b) (3), 365 Mass. 828 (1974). Defense counsel submitted the necessary affidavit and other proof demonstrating he mailed the interrogatories and final notice to the plaintiff's attorney. Plaintiff's counsel does not suggest that defense counsel mailed the interrogatories

or the application for final judgment to an incorrect address. An argument made pursuant to rule 60 (b) (3) must show fraud has been committed on the court. See Winthrop Corp. v. Lowenthal, 29 Mass. App. Ct. 180, 184 (1990) ("'Fraud on the court' implies corrupt conduct and embraces 'only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication'" [citation omitted]). The judge did not abuse his discretion in concluding that no fraud, misrepresentation, or misconduct of defense counsel took place here. L.L., 470 Mass. at 185 n.27.

Order denying motion to  
remove default judgment  
affirmed.

By the Court (Wolohojian,  
Hanlon & Ditkoff, JJ.<sup>8</sup>),

  
Clerk

Entered: July 19, 2019.

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<sup>8</sup> The panelists are listed in order of seniority.